IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 04.06.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Appeal Suit No.973 of 1991

1. Govindaswamy Udayar(died)
2. Savithri
3. S.Rama (Minor)
4. S.Devi (Minor)
5. S.Deivarani (Minor) .. Appellant/2nd Defendant

Minor Appellants 3 to 5 rep.by A2 appellants 2 to 5 have been brought on record as LRs. Of the sole appellant as per order of the Court dated 13.09.2001 in C.M.P.No.9637 of 2001.

Vs.

1. Rojavathymedakar
2. Mayakrishnan
3. Radhakrishnan
4. Maheswari

R2 to R4 declared as Major as per order of court dated 12.3.07 made in C.M.P.NO.964/07 ... Respondents/Plaintiffs

PRAYER: First Appeal u/s 96 of C.P.C against the Judgment and decree dated 24.09.1991 passed in O.S.No.86 of 1983 on the file of the Subordinate Judge Court, Vriddhachalam.

For Appellant : Mr.A.Thiyagarajan
Mr.E.Narayanan

For Respondent : Mr.Hema Sampath S.C.
for R.Meenal

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J U D G M E N T

The second defendant before the Trial Court is the appellant in this first appeal. Pending the appeal the sole appellant died and his legal representatives have been impleaded as appellants 2 to 5. The respondents have filed the suit for partition and allotment of 1/45 and 51/180 shares respectively in respect of A and B Schedule properties and also for return of jewels to the first and second plaintiffs. 'A' schedule properties consist of 55 items which are all immovable property while B schedule properties relate to various moveable goods.

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2. The case of the plaintiffs is that the first and second defendants namely, Poovathu Udayar and Govindasamy Udayar and the husband of the first plaintiff and father of the plaintiffs 2 to 4 late Gopal Udayar were the sons of Kaliyathu Udyar who died instate 45 years ago. Kaliyathu Udayar and his sons consisting of a joint family had various properties enjoyed by his sons commonly without partition. Out of the income from the said property various other properties were purchased in the name of the second defendant (appellant herein) and also in the name of the elder member of the family the first defendant apart from the mother, the third defendant. However, those properties were jointly enjoyed as joint family properties. In the A Schedule properties, which belonged to the joint family consisting of the defendants, Gopal Udayar had one third share. Likewise, in the movable properties mentioned in B Schedule also Gopal Udayar has one third share. Gopal Udayar and the first plaintiff were married on 08.01.1970 at Thirupathi and out of their wedlock plaintiffs 2 to 4 were born. Gopal Udayar died on 23.06.1981 intestate leaving the plaintiffs as well as his mother the third defendant as his legal heirs. Therefore, the 2nd and 4th plaintiffs who are the sons of Gopal Udayar have equal right as per the Hindu Law and in that way they are entitled for one ninth share in the entire property. In the share, which the Gopal Udayar is entitled namely, one ninth share, the plaintiffs as well as the third defendant are entitled for equal share, namely, each 1/45th share. Therefore, the second and 4th plaintiffs are entitled for 51/180th share and first and third plaintiffs are entitled for 1/45th share.

3. That apart, the jewels and other materials which were given to the first plaintiff at the time of her marriage with Gopal Udayar are to be returned. The first defendant Poovathu Udayar died on 17.10.1985 and the fourth defendant is his wife and 5th defendant is his daughter and they are the only legal heirs. The first defendant Poovathu Udayar before his death has executed a Will on 13.10.1985 giving half of his share in favour of second and 4th defendants namely, his brother and wife respectively and the remaining half was given to the daughter of the first defendant Alameluammal namely, the 5th defendant with a life estate, further, stating that if the 5th defendant died without any issues, the property shall go to plaintiffs 2 and 4 absolutely. The third defendant before her death has executed a Will on 21.08.1986 by which after her lifetime the second and fourth plaintiffs are entitled. In view of the same the above suit for partition was filed.

4. After the suit apart from the first defendant, the third defendant also died. The fourth defendant has filed a written statement. While admitting that A & B schedule properties are joint family properties, it is their case that the first defendant was entitled for one third share and after the death of the first defendant, being his legal heirs 4th and 5th defendants namely, his wife and daughter are entitled. The 4th defendant also denies the execution of any Will by Poovathu Udayar on 13.10.1985 or by the third defendant on 21.02.1986 giving the some interest in favour of the plaintiffs. According to the 4th defendant such Will is a forged one.

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5. The 5th defendant has also filed a written statement. While admitting that A Schedule properties are the joint family properties, the 5th defendant also state that there are various other properties purchased in the name of the daughter in law of the second defendant binami from and out of the income from the joint family properties and those properties are also to be added. The 5th defendant also admits that B Schedule properties are the joint family properties. The second defendant in the written statement denies that the first plaintiff is of unsound mind. He also dispute the certificate issued by the Doctor regarding the unsoundness of the first plaintiff. It is also stated that the first plaintiff has filed the suit not only on her behalf but also on behalf of her minor children namely, plaintiffs 2 to 4.

6. In the additional written statement filed by the second defendant, the second defendant denies the Will executed by the first defendant dated 13.10.1985 as not genuine. He also denies the execution of any Will by the third defendant. It is on the basis of the above pleadings the parties went on trial.

7. The Trial Court has framed various issues including as to whether the suit is maintainable, as to whether the A and B Schedule properties are joint family properties, as to whether the B Schedule properties are available, as to whether it is true that Kaliyathu Udayar and his brothers have already partitioned themselves and as to whether the particulars about the property given in the plaint are correct?

8. It is seen that the third plaintiff minor has filed a suit in O.S.No.20 of 1985 through his uncle Venkadesa Udayar for the same relief of partition. Even though both the suits were tried together there is no appeal in respect of the decision rendered in O.S.No.20 of 1985. On the side of the plaintiffs eight witnesses were examined and two documents were marked as Ex.A.1 and A.2. On the side of the defendants apart from the second defendant and third defendant who were examined as D.W.1 and D.W.2 the fourth defendant was also examined as D.W.4 and 117 documents were marked as Ex.B.1 to B.117. That apart, the Commissioner's report in O.S.No.20 of 1985 is marked as a court document.

9. The Trial Court having found that the contention raised by the second defendant that there has been a partition already between his father Kaliyathu Udayar and his brothers Rangappa Udayar and Nangoore Udayar and Kesava Udayar, as per the partition deed dated 29.07.1924 marked as Ex.B.9 and family of Rangappa Udayar have also entered a further partition on 29.08.1924 marked as Ex.B.10 and the said two documents does not contain the signatures of the brothers of the second defendant and having come to a conclusion that the said documents were created and therefore, there was no earlier partition in the family and has ultimately having found that the properties in O.S.No.86 of 83 as well as O.S.No.20 of 1985 are one and the same and parties are also one and the same granted a decree in respect of A schedule alone, dismissing the suit in respect of

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B schedule property. It was as against the said judgement and decree of the Trial Court the second defendant has filed the present appeal.

10. Mr.A.Thiyagarajan, learned counsel appearing for the appellant would submit that Kesava Udayar has settled his share to the first and the second defendants under a deed of settlement executed by him on 12.02.1927 marked as Ex.B.11 and another brother of Kaliyathu Udayar namely, Rangappa Udayar has given the share of his property in favour of his wife Veruthammbal under a Will executed by him dated 28.09.1929 marked as Ex.B.13 and therefore, according to him there was a partition between the said Kaliyathu Udayar along with his brothers and no property was given to Gopal Udayar. While the learned counsel would admit that it is true that B.9 and B.10 was not signed by the brothers of the second defendant the Panchayathaars have signed and in addition to that the wordings of Ex.B.11 in which Kesava Udayar has settled his share to first and second defendants has specifically stated that the property which was given to him as a share and therefore, it should be presumed that there was a partition and therefore, according to him Ex.B.9 and B.10 were acted upon. He would also submit that various properties which were purchased in the name of the second defendant Govindasamy Udayar as seen in Ex.B.22, B.23, B.24, B.25, B.26, B.27 and etc., were not purchased from and out of the income from the joint family funds. Inasmuch as there was an earlier partition between the brothers of Kaliyathu Udayar the parties cannot claim beyond the share of Kaliyathu Udayar.

11. On the other hand, Mrs.Hema Sampath, learned Senior Counsel appearing for the respondents would submit that in fact the first plaintiff was a person of unsound mind and the court has appointed a guardian. She would also submit that the written statement of the 4th defendant who is the wife of the first defendant shows that she is entitled for one third share along with her daughter the 5th defendant. It is further pointed out by the learned Senior Counsel that the 5th defendant in addition would say that there are some other properties which are also to be added for the purpose of partition. She would also refer to the admission made by the second defendant as D.W.1 as a witness saying that he has purchased the property from and out of the various properties of the family as well as the business and he has no objection for giving a share to the plaintiff in respect of the ancestral property. She would also submit that the properties purchased by the second defendant in the name of his wife Savithri who is the second appellant in the appeal as seen in Ex.B.18 to B.21 are all the purchases made subsequent to the suit. She would also submit that the second defendant has even gone to the extent of saying in evidence that there was a partition between him and Gopal Udayar 20 years ago which was not even pleaded.

12. She would also refer to the evidence of the 4th defendant as D.W.2 stating that the first defendant was only doing agricultural operations and the second defendant was managing the properties and therefore, the properties were purchased in the name of the first and second defendants and they were purchased from and out of the income from

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the joint family properties. She would also submit that it is not even the pleading of the second defendant that the properties belong to him and purchased out of his separate income. She would also submit that the legal heirs of the first defendant namely, 4th and 5th defendants who have contested the case and in effect supported the plaintiff's case have not been joined as parties in this appeal. She would rely upon the judgement reported in 2002(1) TLNJ 217 to substantiate her contention that non joining of the legal heirs of the first defendant namely, 4th and 5th defendants in the appeal is fatal to the case of the appellant.

13. After hearing the learned counsel for the appellant as also the learned Senior Counsel for the respondents and having gone through the judgement of the Trial Court as well as various documents, the points that arises for consideration in this appeal is as to whether the judgement and decree of the Trial Court holding that the plaintiffs are entitled for the share as claimed by them in the plaint are wrong and perverse and deserve to be interfered by this Court.

14. In this case as it is correctly found by the learned Trial Judge the contesting party is the second defendant in the suit. It was the specific case of the second defendant that there has been an earlier partition placing reliance on Ex.B.9 and B.10 dated 29.07.1924 and 29.08.1924 and therefore, the present suit for partition is not maintainable. It is also admitted by the learned counsel appearing for the appellant that Ex.B.9 and B.10 does not contain the signature of parties but it is the decision arrived at the Panchayat and therefore, it should be taken as a partition. In this regard, it is relevant to point out that originally there was one Mari Udayar who had four sons namely, Nangoore Udayar, Rangappa Udayar, Kaliyathu Udayar and Kesava Udayar. It is Kaliyathu Udayar whose wife Ponnammal is the third defendant and the other two sons Poovathu Udayar and Govindasamy Udayar, first and second defendants respectively. Kaliyathu Udayar had another son Gopal Udayar which fact is admitted and it is Gopal Udayar's wife who is the first plaintiff and other plaintiffs are his sons and daughter. Since the first defendant Poovathu Udayar died the fourth and fifth defendants, wife and daughter respectively are his legal heirs.

15. Even assuming that the contention of the second defendant is admitted that there was a partition under Ex.B.9 and B.10 a reference to the said documents show that they are stated to be the partition deed between Nangoore Udayar, Rangappa Udayar, Kaliyathu Udayar and Kesava Udayar and there has been a further partition in the family of Rangappa Udayar. The Court has clearly found as admitted by the parties that Ex.B.9 and B.10 has not contained any signature, the court has further found that even under Ex.B.10 there was no witnesses signed. That apart, as correctly found by the Court below the second defendant has not produced any documents to show that Kaliyathu Udayar and his brothers have separately enjoyed the properties by having separate pattas. In fact the second defendant as D.W.1 has stated as if there was an earlier arrangement between Kaliyathu Udayar and his brothers and pursuant to that

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Ex.B.9 and B.10 were entered and in the absence of any such previous document and especially in the circumstances that B.9 and B.10 have not contained the signatures of Nangoore Udayar, Rangppa Udayar and Kaliyathu Udayar, the Court has correctly come to a conclusion that there was no earlier partition among the brothers of Kaliyathu Udayar and himself.

16. It is relevant to point out that if really the partition was true, the first defendant would have stated in the written statement about that. On the other hand, it is admitted by the second defendant himself that after the death of the father Kaliyathu Udayar he has been maintaining the properties and as correctly found by the Court below all the subsequent purchases made by the second defendant were during the time when the second defendant was maintaining the properties on behalf of the family. In this regard it is relevant to point out the evidence of the 4th defendant Chitrammal @ Ponnammal as D.W.3. She says

ஞவாதியின் குறுக்கு விசாரணை/ தாவா சொத்துக்களை 1ம் எதிர்வாதியும் 2ம் எதிர்வாதியும், கோபால் உடையாரும் ஒன்றாகத்தான் சேர்த்து அனுவத்து வந்தார்கள். கிரயச் சொத்துக்களையும் அதே போல் தான் பொதுவான முறையில் அனுபவித்து வந்தார்கள். 2ம் பிரதிவாதி தாவா சொத்துக்களை தனிப்பட்ட முறையில் தன் சொத்தாக எப்போதும் அனுபவித்தது இல்லை.ஞ

17. It is also relevant to point out that even the second defendant who was examined as D.W.1 has admitted that the voters list contains the name of the plaintiff in the house wherein the second defendant is living namely, door no.21 as follows:

ஞஎன் வீட்டில் கதவு இலக்கம் 21 ஆகும். வாக்காளர் பட்டியலில் வாதியின் பெயர் உள்ளது என்று சொன்னால் சரி ஆனால் அந்த அம்மா அங்கு இல்லைஞ

18. That in respect of ancestral property he is prepared to give share to the plaintiff as follows:

ஞஅவைகள் வாதிகளால் தயாரிக்கப்பட்டவை ஆகும். பூர்வீக சொத்தில் பாகத்தில் கொடுக்கப்பட்ட 3.94 சென்டில் வாதிகளுக்கு பாகம் கொடுக்க எனக்கு எந்த விதமான ஆட்சேபனையும் இல்லை.ஞ

19. He has stated subsequently that 20 years ago there was a partition between him and Gopal Udayar who is the husband and father respectively of first plaintiff and other plaintiffs as follows:

ஞஎனக்கும் பூவாத்தை உடையாருக்கும் பாகம் பிரிந்து 20 ஆண்டுகள் இருக்கும். அப்போது கோபால் உடையாருக்கும் பாகம் கொடுத்தோம். கோபால் உடையாருக்கு திருமணம் ஆகும் முன்புதான் பாகம் பிரிந்தது. பாகம் பிரிந்த விவரங்களை எனது ஸ்டேட்மென்டில் சொல்லவில்லை என்றால் அது சரியல்ல.ஞ

20. He has specifically admitted that he has not stated the same in the pleadings. On the specific admission of the second defendant that he

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is prepared to give share from the ancestral properties to the plaintiffs, there is no difficulty to come to the conclusion that the stand taken by the second defendant that there was an earlier partition in the joint family has been shattered into pieces by his own evidence which shows that there is in existence the joint family status.

21. There is one other aspect in this case; it is seen in the written statement filed by the fourth and fifth defendants who were the wife and daughter respectively of the first defendant who died. It is specifically stated that they are entitled for one third share to which the first defendant was entitled and for that the fifth defendant has paid the court fee and fourth defendant has agreed to pay the same. The Trial Court while granting decree in respect of A Schedule property for the plaintiff by holding that the properties are joint family properties and the parties are entitled and therefore, it goes without saying that the said fourth and fifth defendants are entitled to the share which they have claimed in the written statement. In such circumstances, the second defendant while filing the appeal has not chosen to include the fourth and fifth defendants in the appeal. Therefore, it is contended by the learned Senior Counsel for the respondents that it should be taken that the judgement by the Trial Court should be treated as final as far as the fourth and fifth defendants are concerned who have claimed 1/3rd share as it was made by the plaintiffs themselves whose claim has been accepted in respect of A Schedule properties and in such circumstances, the appeal without impleading the fourth and fifth defendants deserves to be dismissed.

22. In support of her contention she would also rely upon the judgement of the Division Bench of this Court in Atika Begum & others Vs. Haji A.A.M.Abdulla and others reported in 2002(1) TLNJ 217. That was the case wherein in respect of the some of the respondents the appeal was already dismissed and in such circumstances as against the single decree for partition whether the appeal can be taken in respect of the other respondents and in that situation the Division Bench has held that since the partition decree happen to be a joint one, the appeal was dismissed in toto. That was also the law laid down by the Hon'ble Supreme Court in State of Punjab Vs. Nathuram reported in AIR 1962 SC 89 and also in Rameshwar Prasad and others Vs. Shambehari Lal Jagannath and another reported in AIR 1963 SC 1901 while dealing with Order 41 Rule 4 of Code of Civil Procedure.

23. On the factual position as I have stated above that there is absolutely no evidence as correctly found by the Trial Court about the earlier partition and on the other hand the evidence of D.W.1 itself is clear that joint family status continues, there is no question of presumption of notional partition as contended by the learned counsel for the appellant placing reliance on the judgement of the Hon'ble Apex Court rendered in Anar Devi and others Vs. Parameshwari Devi and others reported in 2006 AIR SCW 5063. Therefore, the said judgement is not applicable to the facts and circumstances of the present case.

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24. In view of the above said facts, I am of the considered view that there is absolutely no illegality or perversity in the judgement and decree of the Trial Court and it cannot be termed that the Trial Court judgement is wrong. In these circumstances, the first appeal fails and the same is dismissed, confirming the judgement and decree dated 24.09.1991 passed in O.S.No.86 of 1983 with cost.

25. It is made clear that since the matter is relating to 1983 more than 24 years have lapsed, the Trial Court is directed to take up the final decree proceedings if the same are pending and dispose of the same expeditiously taking into consideration that this is one of the oldest cases and giving priority to the same.

nbj

sd/-
Asst.Registrar

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Sub Asst.Registrar

To

1. The Subordinate Judge,
   Vridhachalam.

2. The Record Keeper,
   V.R.Section,
   High court, Madras.

+ 1 cc to Mr.R.Subramanian Advocate SR.NO.37578
+ 1 cc to Mr.A.Thiyagarajan Advocate SR.NO.31893

GG(CO)
RD 18.9.07

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